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No. 10-69

In The
Supreme Court of the United States

SELRAHC LIMITED PARTNERSHIP
and KATINA ROYE PEEVYHOUSE
(formerly known as KATINA R. ROYE),

Petitioners,

v.

SEECO, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Arkansas

BRIEF OF RESPONDENT, SEECO, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

The parent corporation of SEECO, Inc. is Southwestern Energy Company, which owns 100% of the stock of SEECO, Inc. Southwestern Energy Company is publicly traded. No publicly held company owns 10% or more of the stock of Southwestern Energy Company.

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STATEMENT OF THE CASE

Petitioners, who claim to own severed mineral interests in Van Buren County, Arkansas, filed this action below seeking to quiet title to their purported ownership, which was based upon a 1973 tax sale deed. App. 13, 16, and 19. Respondents asserted the tax sale deed was void under Arkansas law and moved for summary judgment dismissing Plaintiffs' claim of ownership. App. 14 and 20. The trial court noted the well established principle of Arkansas property law requiring subjoinder of assessments of severed mineral interests to the assessments of the corresponding surface interests and, that in the absence of subjoinder, any tax sale deed was void. App. 20-21. Since the Van Buren County tax assessment records in the 1970's did not subjoin severed mineral assessments to surface assessments, the trial court granted summary judgment to the Respondents and dismissed Petitioners' claim of ownership of the severed mineral interests. App. 22.

By Act 961 of 1985, the Arkansas legislature, for the first time, allowed tax assessors to maintain separate records for severed mineral interests if those records are maintained by legal description of the surface estate in the same manner as surface records are maintained. Ark. Code Ann. § 26-26-1112 (Repl. 1997). Based upon Arkansas Supreme Court precedent, the trial court refused to retroactively apply the newly permissive method of assessment. App. 21-22.

Petitioners appealed to the Arkansas Court of Appeals. *Selrahc Ltd. Partnership v. SEECO, Inc.*, 2009 Ark. App. 865, 2009 WL 4840206, ___ S.W.3d ___ (2009). The Court of Appeals applied the same long-standing rule of Arkansas property law, rejecting Petitioners' claim of ownership of the severed mineral interests and holding that the tax sale deed relied upon by Petitioners was void. App. 1 (discussion following at App. 2-8). The Court of Appeals likewise rejected Petitioners' argument for retroactive application of Ark. Code Ann. § 26-26-1112. App. 9-10. The Court of Appeals did not rule upon Petitioners' claimed "unconstitutional violation of the separation-of-powers doctrine" as that issue was not preserved for review under established Arkansas procedure. App. 8.

The Petitioners filed a Petition for Review with the Arkansas Supreme Court (the Petition for Review is printed in the attached Respondent's Appendix 1-4). The Petition for Review makes no mention of the Fifth Amendment and Fourteenth Amendment protections against deprivation of property without due process of law on which Petitioners rely in their Petition for Writ of Certiorari. Petition at 2-3. The Petition for Review asserts the Arkansas legislature's adoption of Act 961 of 1985 was controlling Arkansas law and "any decision now failing to give effect to such statute creates an unconstitutional violation of the separation of powers doctrine." Resp. App. 3. The Arkansas Supreme Court denied Petitioners' Petition for Review. App. 25.

Petitioners' Petition for Writ of Certiorari ensued.

ARGUMENT

Respondent, SEECO, Inc., hereinafter referred to as "SEECO," respectfully suggests the Petition for Writ of Certiorari should be denied. Petitioners' argument that a taking of property has occurred as a result of decisions of the Arkansas courts has not been sufficiently pressed or passed upon by the Arkansas courts to justify review by this Court. Also, Petitioners have failed to comply with Supreme Court Rule 14(1)(g)(i). Additionally, there is no substantive merit to Petitioners' argument. Petitioners' claim of ownership of the severed mineral interests is based upon a tax sale deed which is void pursuant to established Arkansas law. Petitioners' assertion that the Arkansas courts changed Arkansas law subsequent to Petitioners' acquisition of the tax sale deed is incorrect and should be rejected. Finally, the dismissal of Petitioners' claim below resulted from a summary judgment limited to the void tax sale deed issue. Additional defenses to the purported validity of the tax sale deed based upon due process principles as espoused in this Court's decision in *Jones v. Flowers*, 547 U.S. 220 (2006) remain.

I. THIS COURT SHOULD DENY PETITIONERS' PETITION FOR CERTIORARI BECAUSE THE ASSERTED FEDERAL QUESTION IS NOT PROPERLY BEFORE THIS COURT.

The Petition for Writ of Certiorari should be rejected because the unconstitutional taking of property argument was never pressed or passed upon by the Arkansas courts. As a consequence, Petitioners have failed to comply with the Rules of this Court requiring specific references to the record where the federal constitutional question was timely and properly raised.

A. Petitioners' assertion of an unconstitutional taking of their property in violation of the Fifth and Fourteenth Amendments was not pressed or passed upon by the Arkansas Courts and, therefore, cannot be considered by this Court.

While Arkansas law permits the severing of mineral interests from surface estates and the separate assessment of the severed mineral interests for tax purposes, tax sale deeds of severed mineral interests are void if the tax assessments of the severed mineral interests were not subjoined to the corresponding assessments of the surface estates. *Sorkin v. Myers*, 216 Ark. 908, 911, 227 S.W.2d 958, 960 (1950). In *Sorkin*, the Arkansas Supreme Court declared:

> The minerals, being primarily an interest in the land, are severable only because the legislative authority has made them so; yet for taxing purposes they are so closely related to the realty that ownership identification and accuracy make it well-nigh imperative that the mineral listings be subjoined to the land assessments. Any method that destroys this unilateral relationship burdens ready determination when an owner seeks information respecting the status of his interest at a given time.

216 Ark. at 912, 227 S.W.2d at 960.

Petitioners' purported tax title is derived from a 1973 tax sale deed. App. 19. Petitioners argue that the Arkansas courts' application of the subjoinder rule created a judicial taking of Petitioners' claimed mineral interest. Petition at 16. Petitioners' unconstitutional takings issue, however, was not "pressed or passed upon" by the state courts. Because Petitioners' federal constitutional argument was not properly presented or addressed by the trial court, the Arkansas Court of Appeals or the Arkansas Supreme Court, this Court should decline to review Petitioners' claims.

This Court has long adhered to the practice of not hearing questions which were not presented or decided in the court whose judicial action is under review and which are raised here for the first time. *See Clark v. Arizona*, 548 U.S. 735, 765 (2006); *Howell v. Mississippi*, 543 U.S. 440, 443 (2005);

Adams v. Robertson, 520 U.S. 83, 86 (1997); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 76 (1988); *Buchanan v. Kentucky*, 483 U.S. 402, 404, footnote 1 (1987); *Illinois v. Gates*, 462 U.S. 213, 218-19 (1983); *Webb v. Webb*, 451 U.S. 493, 495-97, 499 (1981); *Hill v. California*, 401 U.S. 797, 805-06 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *State Farm Mut. Automobile Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945); *Whitney v. California*, 274 U.S. 357, 360 (1927); *Crowell v. Randell*, 35 U.S. 368, 398-99 (1836). In *Crowell*, this Court stated that it was without jurisdiction unless a federal question had been both raised and decided in the state court below. 35 U.S. at 392. This practice is often characterized as the "not pressed or passed upon below" rule. This Court has not always been absolutely consistent in the characterization of the "not pressed or passed upon below" rule with early cases treating the rule as jurisdictional, while more recent opinions view the rule as a prudential restriction which does not pose an absolute restriction to this Court's review. *Bankers Life & Casualty Co.*, 486 U.S. at 79. However, it is not necessary to characterize the rule here, because, assuming the rule is prudential, the more prudent course of action for the Court is to decline to review Petitioners' claim.

The "not pressed or passed upon below" rule is derived from 28 U.S.C. 1257(a). Under that statute, this Court has almost always refused to review a state-court decision based upon federal grounds unless the federal claim was either addressed by or

properly presented to the state court whose judgment is under review. *Howell*, 543 U.S. at 443 (*citing Adams v. Robertson*, 520 U.S. 83, 86 (1997)). The "not pressed or passed upon below" rule requires, at a minimum, that "there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim in the time and in the manner *required by the state law*." *Webb*, 451 U.S. at 501 (emphasis added).

This Court has enumerated various reasons for the "not pressed or passed upon below" rule. First, the record is likely to be inadequate if the federal question at issue was not properly presented at the state court level. *Gates*, 462 U.S. at 221 (1983) (*citing Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969)). In addition, principles of comity require that state courts be given the opportunity to perform their duties, which include construing and applying the applicable federal requirements. *Webb*, 451 U.S. at 499. Finally, by requiring that litigants first properly present federal claims to the state courts and giving those courts an opportunity to decide those claims, the state court is permitted "to rest its decision on an adequate and independent state ground." *Gates*, 462 U.S. at 222.

Petitioners' asserted Federal Constitution violation was not "pressed or passed upon" by the Arkansas courts. Petitioners state that "[t]hese constitutional issues were raised . . . in their briefs to the

trial court and the Arkansas Court of Appeals." Petition at 5, footnote 1. Petitioners do not provide "pertinent quotations of specific portions of the record" as required by Supreme Court Rule 14(1)(g)(i). As reflected by SEECO's brief to the Arkansas Court of Appeals, Petitioners below merely mentioned the asserted constitutional issue in their pleadings to the trial court and did not develop the issue factually or legally but, to the contrary, advised the trial court that the involved issues at the summary judgment motion hearing were limited to (1) distinguishing prior subjoinder cases and (2) a contention for retroactive application of Arkansas Act 961 of 1985. *See* Resp. App. 5-8. The Arkansas Court of Appeals identified the issue, in part, as a state law "separation-of-powers doctrine" issue, and found the issue was not preserved for review because the trial court did not clearly and specifically address the issue. App. 8.

Arkansas law requires Petitioners to fully and completely develop all issues before the trial court. *Rounsaville v. State*, 372 Ark. 252, 258-59, 273 S.W.3d 486, 492 (2008); *Eastin v. State*, 370 Ark. 10, 16-18, 257 S.W.3d 58, 63 (2007); *Raymond v. State*, 354 Ark. 157, 162-68, 118 S.W.3d 567, 571-74 (2003). Well established Arkansas caselaw specifically requires that constitutional arguments must be raised and fully developed in the trial court. *Raymond*, 354 Ark. at 162, 118 S.W.3d at 571. Moreover, Petitioners had the burden of obtaining from the trial court a clear ruling on all issues presented for appeal, and undecided questions could not be relied upon on appeal.

Miskelley v. State, 323 Ark. 449, 471, 915 S.W.2d 702, 714, *cert. denied*, 519 U.S. 898 (1996); *Bowen v. State*, 322 Ark. 483, 502, 505, 911 S.W.2d 555, 564, 565 (1995), *cert. denied*, 517 U.S. 1226 (1996). The Arkansas Supreme Court has repeatedly stated that the failure to obtain a ruling on an issue at the trial court level, including a constitutional issue, precludes a review of the issue on appeal. *See, e.g., Parker v. BancorpSouth Bank*, 369 Ark. 300, 311, 253 S.W.3d 918, 925-26 (2007); *Morrison v. Jennings*, 328 Ark. 278, 284, 943 S.W.2d 559, 562 (1997).

Petitioners' unconstitutional takings claim was not pressed for decision by the trial court. App. 11-23. The trial court noted "[t]he only issues before the Court in this Motion for Summary Judgment are whether the original tax deeds are void under Arkansas Law and whether the court should retroactively apply Ark. Code Ann. 26-26-1112." App. 20. Petitioners are correct in that the takings issue was mentioned to the Arkansas Court of Appeals by Petitioners' brief; however, because the Petitioners failed to obtain a ruling from the trial court on the issues, the issue was not properly raised for review by the Arkansas Court of Appeals. App. 8.

For the "pressed and passed upon" rule to be satisfied, the Arkansas Court of Appeals must have been apprised of the Petitioners' federal claim in the manner required by Arkansas law. *See Webb*, *supra* 451 U.S. at 501. This, Petitioners did not do. Petitioners' presentation to the Arkansas Supreme Court was even more deficient. The takings issue is not

mentioned, and Petitioners merely asserted the decisions of the Arkansas courts created "an unconstitutional violation of the separation of powers doctrine." Resp. App. 3. As the federal "separation of powers doctrine" is not applicable to the States, *Dreyer v. Illinois*, 187 U.S. 71, 83-84 (1902), Petitioners' reference was to Arkansas' separation of powers doctrine. Petitioners' Petition for Review to the Arkansas Supreme Court does not even mention the federal issue upon which their Petition for Writ of Certiorari is based.

Petitioners assert their federal claim is properly before this Court citing *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, ___ S.Ct. ___, 2010 WL 2400086 (2010), hereinafter "*Stop the Beach*." Petition at 5, footnote 1. However, there is a clear distinction between the procedural history of *Stop the Beach* and this case.

Petitioners in *Stop the Beach* sought rehearing before the Florida Supreme Court on grounds that the Florida court's decision effected a taking in violation of petitioners' Fifth and Fourteenth Amendment rights. ___ S.Ct. ___, 2010 WL 2400086 at 7. After the Florida Supreme Court denied the request for rehearing, the petitioners requested this Court grant certiorari on the same constitutional grounds – violation of the Fifth and Fourteenth Amendments. *Id.* at 1.

In contrast, here, Petitioners' Petition for Review to the Arkansas Supreme Court did not present an

issue of unconstitutional taking in violation of the Fifth and Fourteenth Amendments; but rather, Petitioners sought review by the Arkansas Supreme Court on the grounds that the lower courts' rulings effectuated an "unconstitutional violation of the separation of powers doctrine." Resp. App. 3. Unlike the Florida Supreme Court in *Stop the Beach*, the Arkansas Supreme Court was never given the opportunity to address whether the trial court's or the Arkansas Court of Appeals' ruling unconstitutionally divested Petitioners of their property in violation of the Fifth and Fourteenth Amendments.

Petitioners consistently have failed to properly present their purported Fifth and Fourteenth Amendments claim to the Arkansas courts. Petitioners' request for a writ of certiorari does not meet either prong of the "pressed or passed upon below" rule. Because Petitioners' claim of Federal Constitution violation was not properly presented to and was not decided by the Arkansas courts, this Court should decline to review Petitioners' claim.

B. Petitioners failed to comply with Supreme Court Rule 14(1)(g)(i).

Because Petitioners seek review of a state-court judgment, Supreme Court Rule 14(1)(g)(i) requires the petition to provide:

> [S]pecification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal

> questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and the pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears, so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Petitioners have failed to specify when the federal question at issue was raised, how Petitioners raised the federal question at the state-court level and how the state courts decided the question. Further, Petitioners fail to provide this Court with pertinent quotations or summaries of specific portions of the record in which Petitioners' federal claim appears. Instead, Petitioners make the blanket assertion that, "[t]hese constitutional issues were raised by Petitioners in their briefs to the trial court and the Arkansas Court of Appeals." Petition at 5, footnote 1. Petitioners also broadly state that the trial court's opinion was "challenged on constitutional grounds asserted herein." Petition at 5. Other than generally alluding to Petitioners' "briefs" to the trial court and the Arkansas Court of Appeals, Petitioners fail to reference any specific portions of the record which would indicate the manner and method of presenting the federal question.

Petitioners fail to address the way in which the Arkansas Court of Appeals or the trial court passed

upon Petitioners' federal question. Petitioners merely assert that both the trial court and the Arkansas Court of Appeals followed precedent of the Arkansas Supreme Court. Petition at 4. Petitioners' failure to reference specific portions of the trial court's ruling addressing the federal question is understandable because no such address exists. Petitioners did not obtain a ruling from the trial judge on the takings issue. App. 8 and 20. Likewise, the Arkansas Court of Appeals never decided Petitioners' unconstitutional taking argument as it had not been preserved for review. App. 8.

Petitioners utterly fail to reference the record to show how their takings issue was timely and properly raised to the Arkansas Supreme Court. As noted earlier, their Petition for Review to the Arkansas Supreme Court merely refers to a separation of powers doctrine issue. Resp. App. 3.

Petitioners have failed to comply with Rule 14(1)(g)(i) of this Court by not specifically referencing in the record where and how the Arkansas courts were presented and decided the federal question at issue. This Court should deny review of the Petition for Writ of Certiorari for failure to comply with Supreme Court Rule 14.

II. THE ARKANSAS COURTS CORRECTLY HELD THE TAX SALE DEED RELIED ON BY PETITIONERS TO BE VOID BASED UPON SETTLED ARKANSAS JURISPRUDENCE. THERE HAS BEEN NO JUDICIAL TAKING.

Petitioners claim ownership of severed mineral interests in Van Buren County, Arkansas, through a 1973 tax deed acquired by their predecessor in interest. App. 19. The Arkansas courts correctly adhered to more than five decades of consistent Arkansas case law in holding that tax deed void because the county assessor did not properly subjoin the severed mineral assessments to the corresponding surface assessments. The Arkansas Court of Appeals did not err or effectuate a judicial taking when it affirmed the trial court's ruling.

Petitioners assert the 1973 tax sale deed created a property right which was taken from them in 1983 and 1984 when the Arkansas Supreme Court decided *Garvan v. Potlach Corp.*, 278 Ark. 414, 645 S.W.2d 957 (1983) and *Dawdy v. Holt*, 281 Ark. 171, 662 S.W.2d 818 (1984). Petitioners assert *Garvan* and *Dawdy* changed Arkansas law, for the first time, to make tax deeds void based upon tax procedures where assessments of severed mineral interests were not subjoined to the corresponding surface interest assessments. Petition at 3, 5, 8, 9, 14 and 15. Petitioners assert the taking was accomplished in this case when the Arkansas Court of Appeals relied on *Garvan* and *Dawdy* to uphold the trial court's

decision that Petitioners' tax sale deed was void. Petition at 11-13.

In support of this argument, Petitioners rely heavily on a recent case of this Court, namely *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, ___ S.Ct. ___, 2010 WL2400086 (2010), hereinafter "*Stop the Beach*." Petitioners' reliance on *Stop the Beach* is misplaced. It and the other cases cited by Petitioners are clearly distinguishable from the facts of this case.

In *Stop the Beach*, a plurality of this Court concluded that the Takings Clause is not addressed to the action of a specific branch of government. *Id.* at 8. The Takings Clause is concerned with the act, not the governmental actor. *Id.* Therefore, a judicial taking has occurred if, as a result of a court's decision, an established right of property no longer exists. *Id.* at 10. An essential factor in deciding if a judicial taking has occurred is whether the property right allegedly taken is an "established right of property." *Stop the Beach*, ___ S.Ct. ___, 2010 WL2400086 at 21, footnote 9. If there is doubt about a property right's existence, then the property right is not "established." *Id.* Likewise, under a judicial takings analysis, the court's decision must actually contravene the complaining party's established property right so that, if the decision merely clarifies or elaborates upon property issues which before were unclear, the court cannot be said to have taken an established property right. *Id.* at 22.

Petitioners' reliance on *Stop the Beach* fails because Petitioners' 1973 tax deed was void under Arkansas law that long predates the 1973 tax deed as well as the 1983-1984 decisions in *Garvan* and *Dawdy*, which, at best from Petitioners' perspective, merely clarified the subjoinder principle in Arkansas law.

The subjoinder rule of Arkansas law was not created by *Garvan* or *Dawdy* in the 1980s. Rather, those decisions merely affirmed and clarified the subjoinder principle which had been established since the 1950s. For pre-1970's cases, *see Sorkin v. Myers*, 216 Ark. 908, 227 S.W.2d 958 (1950); *Schuman v. Ouachita County*, 218 Ark. 46, 234 S.W.2d 42 (1950); *Davis v. Stonecipher*, 218 Ark. 962, 239 S.W.2d 756 (1951); *Stienbarger v. Keever*, 219 Ark. 411, 242 S.W.2d 713 (1951); *Smiley v. Thomas*, 220 Ark. 116, 246 S.W.2d 419 (1952). For post-1970's and pre-*Garvan* and *Dawdy* cases, *see Adams v. Bruder*, 275 Ark. 19, 627 S.W.2d 12 (1982); *Hurst v. Rice*, 278 Ark. 94, 643 S.W.2d 563 (1982); *Walker v. Western Gas Co.*, 5 Ark. App. 226, 635 S.W.2d 1 (1982).

In 1950, in *Sorkin,* the Arkansas Supreme Court interpreted the Arkansas assessment statutes to require subjoinder of severed mineral assessments to the corresponding surface assessments. There, the Court stated:

> The minerals, being primarily an interest in the land, are severable only because the legislative authority has made them so; yet

> for taxing purposes they are so closely related to the realty that ownership identification and accuracy make it well-nigh imperative that the mineral listings be subjoined to the land assessments. Any method that destroys this unilateral relationship burdens ready determination when an owner seeks information respecting the status of his interest at a given time.

Sorkin, 216 Ark. at 912, 227 S.W.2d at 960.

The statutory requirement for subjoinder was reiterated by the Arkansas Supreme Court, again in 1950, in *Schuman*. There, the Arkansas Supreme Court stated, "[in *Sorkin* w]e held that the statutes require that mineral interests to be subjoined to the assessment of the corresponding surface ownerships . . . " *Schuman*, 218 Ark. at 47, 234 S.W.2d at 43. Likewise, in *Stienbarger*, in 1951, the Arkansas Supreme Court, in referring to the facts of *Sorkin* and *Davis*, stated, "[i]n those cases it was shown that severed mineral interests were listed . . . in a separate book . . . instead of being subjoined to the corresponding surface ownerships. . . ." 219 Ark. at 412, 242 S.W.2d at 713. In 1982, pre-*Garvan* and *Dawdy*, the Arkansas Supreme Court again stated that assessments for mineral interests must be subjoined to the corresponding surface estates. *Hurst*, 278. Ark. at 98, 643 S.W.2d at 565 (*citing Adams v. Bruder, supra*).

Pre-*Garvan* and *Dawdy*, the Arkansas Court of Appeals stated:

> The law in Arkansas has long been established that for a valid mineral assessment the mineral estate listing must be subjoined to the surface estate. *Adams v. Bruder, supra*; *Sorkin v. Myers*, 216 Ark. 908, 227 S.W.2d 958 (1950). Here, the mineral rights were improperly listed and the original tax sale was void.

Walker, 5 Ark. App. at 228-29, 635 S.W.2d at 2.

It is evident, from the express language of *Sorkin, Schuman*, and *Stienbarger*, the subjoinder requirement was an established rule of Arkansas law long before the 1973 tax sale deed. *Adams*, *Hurst* and *Walker* clearly demonstrate that the subjoinder requirement pre-dated and was not invented in *Garvan* and *Dawdy*. Petitioners' claim that *Garvan* and *Dawdy* created new law and effectuated a taking of Petitioners' property fails. Petitioners' 1973 tax deed was void under then established Arkansas law and, thus, it created no established property right subject to being taken.

The Arkansas Court of Appeals' application of *Garvan* and *Dawdy* did not divest Petitioners of any property because Petitioners never had an established property right under Arkansas law. The tax deed, through which Petitioners claim title, was void because it was based upon an improper tax assessment. Petitioners argue "that it was not until" *Garvan*

and *Dawdy* in 1983 and 1984, respectively, that the *Sorkin* line of cases was transformed into a new rule not required by the case law or statutes at the time the Petitioners obtained their interest in the severed minerals. Petition at 8-9. This foregoing review of the pre-*Garvan* and *Dawdy* cases demonstrates that Petitioners are wrong.

In an attempt to bolster their argument that *Garvan* and *Dawdy* created a new principle of Arkansas law, Petitioners assert the rulings of *Sorkin* and its progeny are based upon landowners' due process rights because alphabetical listings of mineral assessments deprived landowners of notice. Petition at 6-9. The Arkansas Supreme Court's ruling in *Sorkin* was not based upon a due process rationale but rather was based upon the Court's interpretation of Arkansas' assessment statutes. In *Sorkin*, the Court stated, "our decision in all of the cases rests upon the proposition that the procedure legislatively intended was not followed. Instead, there was a course of well-intentioned conduct that deprived the property owners of the process provided for assessing and selling." 216 Ark. at 913, 227 S.W.2d at 961. The statutory process basis for the subjoinder requirement was again expressed in *Schuman*. There, the court held, " . . . that the statutes require mineral interests to be subjoined to the assessment of the corresponding surface ownerships. . . ." *Schuman*, 218 Ark. at 47, 234 S.W.2d at 43. In *Adams*, the court reiterated that the subjoinder principle was based upon the fact that

legislatively intended procedure was not followed. 275 Ark. at 22, 627 S.W.2d at 13.

Particularly notable is a 1958 law review article discussing tax forfeiture problems in title examination in Arkansas. *See O.B. Core, Tax Forfeiture Problems in the Examination of Abstracts*, 12 Ark. L. Rev. 333, 338-39 (1959). The article discusses a title examination problem identified as "mineral rights only have been forfeited for non-payment of taxes and the redemption period has expired." Noting that the Arkansas Supreme Court had ruled alphabetically listed assessment to be void, the article continues:

> Some assessors arrange the description in this separate mineral book or separate mineral section of the tax books to follow the same outline of the organization of the surface, that is, beginning with the NE 1/4 of the NE 1/4 of section 1 and continuing across to the left and down. However, this procedure, while a little more usable, is void also. The Supreme Court has repeatedly stated that the only way to assess minerals is by subjoining them to the surface assessments.

Id. at p. 338.

Note, again, that this Arkansas Law Review article was published in 1958, long before Petitioners' predecessors' tax sale deed and even longer before *Garvan* and *Dawdy*. *Garvan* and *Dawdy* did nothing more than affirm and clarify the established principle of subjoinder. For example, *Garvan* provided a

definition of subjoinder. 278 Ark. at 416, 645 S.W.2d at 958. Lawyer Core in his 1958 article noted that the "Supreme Court has not as yet specifically clarified . . . just what mechanics is meant by the term 'subjoining.' The most liberal interpretation of the term would seem to be that the mineral description should follow immediately after the surface description." 12 Ark. L. Rev., *supra* at 338-39. Twenty-five years later, the Arkansas Supreme Court provided the clarifying definition. No unconstitutional taking is effectuated by clarifying an existing legal principle. *Stop the Beach*, ___ S.Ct. ___, 2010 WL2400086 at 22.

Petitioners also rely upon *Hughes v. Washington*, 389 U.S. 290 (1967) and *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), reversed on procedural grounds, 477 U.S. 902 (1986). Petition at 15-16. Both cases are distinguished from the situation here by the established nature of the involved properties in *Hughes* and *Robinson* as compared to lack of property interest here.

Hughes involved the established common law right of owners of property bordering the ocean to any acreations gradually built up by the ocean, an established right which was taken away by the 1889 Constitution of the State of Washington as interpreted by the Washington Supreme Court. *Hughes*, 389 U.S. at 291. *Robinson* involved a decision of the Supreme Court of Hawaii to overrule prior caselaw and declare for the first time, after more than a century of different law, the common law doctrine of riparian ownership to be the law of Hawaii. *Robinson*,

753 F.2d at 1474. Established, vested rights were changed by judicial decisions in *Hughes* and *Robinson*. In contrast, here, Petitioners' claim of an ownership right, based upon a void tax sale deed, was not an established right. Rather, established Arkansas law made the attempted deed void, and the decisions of the Arkansas courts in this case correctly affirmed the invalidity of the Petitioners' claim.

When there is doubt about a property right's existence it cannot be termed an established property right, and this Court will accept the determination of the state court regarding the established nature of the asserted property right. *See Stop the Beach*, ___ S.Ct. ___, 2010 WL2400086 at 21, footnote 9. As verified by the Arkansas authorities cited *supra*, in Arkansas, tax sale titles of severed mineral interests where tax assessments of the severed interest were not subjoined to the surface interest were void long before Petitioners' predecessor acquired the 1973 tax deed and even longer before *Garvan* and *Dawdy*.

CONCLUSION

Interestingly, while Petitioners assert a judicial taking of their property without due process, Petitioners' claimed property is a tax sale title that most surely would fail under the due process requirements announced in *Jones v. Flowers*, 547 U.S. 220 (2006). As noted *supra* at page 1, the *Jones v. Flowers* issue

was not reached by the summary judgment proceeding below and remains an additional defense.

Regardless, Respondent respectfully suggests the Petition for Writ of Certiorari should be denied. Petitioners did not sufficiently present to and obtain decisions by the Arkansas courts to satisfy the policy bases for the "not pressed or passed upon below" rule. Neither did Petitioners comply with Supreme Court Rule 14.

Moreover, there was no judicial taking accomplished by the 1983 and 1984 decisions of the Arkansas Supreme Court in *Garvan* and *Dawdy*. The Arkansas requirement of subjoinder of severed mineral interest tax assessments with corresponding surface assessments was established law, reflected both by judicial decisions and legal commentary, long before the attempted tax sale deed in 1973 and even longer before *Garvan* and *Dawdy*.

For all these reasons, Respondent, SEECO, Inc., respectfully requests that Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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IN THE ARKANSAS SUPREME COURT

SELRAHC LIMITED PARTNERSHIP and KATINA ROYE PEEVYHOUSE (formerly known as KATINA R. ROYE) **APPELLANTS**

v. **CASE NO. _____**

SEECO, INC., et al. **APPELLEES**

Arkansas Court of Appeals Case No. CA-09-00240

Appeal From the Van Buren County Circuit Court
Honorable Rhonda K. Wood, Circuit Judge

APPELLANT'S PETITION FOR REVIEW

The Appellants, Selrahc Limited Partnership, and Katina Roye Peevyhouse, petitions this Honorable Court for review of the decision of the Arkansas Court of Appeals in the case styled Selrahc Limited Partnership and Katina Roye Peevyhouse (formerly known as Katina A. Roye) v. SEECO, Inc., et al., Case No. CA-09-378 (Div. III), opinion delivered December 16, 2009, for the following reasons:

1. The Court of Appeals erred with respect to multiple grounds listed in Rule 1-2(b), to wit:

   a) Significant issues needing clarification or development of the law or overruling precedent (Rule 1-2(b)(5));

> b) Appeals involving substantial questions of law concerning the validity, construction, or interpretation of an act of the General Assembly . . . (Rule 1-2(b)(6)).

2. The Court of Appeals erroneously held that it was "confronted with the same situation in which we found ourselves when we decided *Blackburn v. Cline*, 8 Ark. App. 108, 650 S.W.2d 588 (1983). As in *Blackburn*, we affirm the Circuit Court." (Court of Appeals Opinion, p. 1). This case is clearly different from the situation existing at the time of the *Blackburn* opinion because of the passage of Act 961 of 1985, now codified as A.C.A. § 26-26-1112. In *Blackburn*, the Court of Appeals expressly stated that it was bound by this Court's decision of *Garvan v. Potlatch Corporation*, 278 Ark. 414, 645 S.W.2d 957 (1983). *Blackburn*, 8 Ark. App. at 110-11 650 S.W.2d 590. Importantly, however, *Garvan* was legislatively overruled by the passage of Act 961 of 1985. In this case, the Court of Appeals failed to recognize that it is not *now* bound by this Court's decision in *Garvan*.

3. The Court of Appeals further erred in holding that it was bound by this Court's decision in *Gilbreath v. Union Bank*, 309 Ark. 360, 830 S.W.2d 854 (1992), concerning the application of A.C.A. § 26-26-1112. Importantly, the appellant in *Gilbreath* never argued for the application of such statute, and therefore the issue was never properly developed nor adequately discussed by this Honorable Court in *Gilbreath*.

4. This Court should accept the review of this case in order to properly develop and clarify the law as it pertains to tax deeds which clearly met the requirements of applicable statutes, and were not truly rendered invalid by this Court's opinions discussing the judicial rule of "subjoinder" prior to *Garvan v. Potlatch Corporation* or *Dawdy v. Holt*, 281 Ark. 171, 662 S.W.2d 818 (1984). Because the *Garvan* and *Dawdy* decisions were effectively overruled by Act 961 of 1985, any decision now failing to give effect to such statute creates an unconstitutional violation of the separation of powers doctrine. The Court of Appeals opinion, and the opinion of the Circuit Court are therefore unconstitutional. Consequently, the additional grounds listed in Rule 1-2(b) are implicated:

c) Issues of first impression (Rule 1-2(b)(1));

d) Issues of substantial public interest (Rule 1-2(b)(4)); and

e) Issued involving federal constitutional interpretation (Rule 1-2(b)(3)).

5. In sum, the Court of Appeals decision in this case improperly gave "new life" to this Court's opinions in *Garvan* and *Dawdy*, which were clearly intended to be "overruled" by the legislature through the passage of Act 961 of 1985. Unfortunately, the appellant in *Gilbreath v. Union Bank*, 309 Ark. 360, 830 S.W.2d 854 (1992) did not brief this Court on the application of such statute, depriving the Court of the opportunity for fair and full consideration of the

issue. This case presents the Court with such opportunity.

RESPECTFULLY SUBMITTED,
SELRAHC, Limited Partnership;
KATINA R. PEEVYHOUSE (f/k/a
KATINA R. ROYE); *Plaintiffs*

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CERTIFICATE OF MERIT

The undersigned, Joe D. Byars, Jr., does hereby certify that this Petition for Review is believed, in good faith, to present arguments of substantial merit and is not filed for the purpose of delay.

/s/ Joe D. Byars, Jr.
JOE D. BYARS, JR.

[Certificate Of Service Omitted In Printing]

IN THE ARKANSAS SUPREME COURT

SELRAHC LIMITED PARTNERSHIP and
KATINA R. PEEVYHOUSE, f/k/a
KATINA R. ROYE APPELLANTS

Case No. 09-00378

SEECO, INC. et al. APPELLEE

APPEAL FROM THE
VAN BUREN COUNTY CIRCUIT COURT
CIVIL DIVISION

THE HONORABLE RHONDA K. WOOD
CIRCUIT JUDGE

SUPPLEMENTAL ABSTRACT AND BRIEF OF APPELLEE SEECO, INC.

(Filed Jul. 8, 2009)

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* * *

"effect of invalidating titles that were acquired in reliance upon the rule to question." *Eubanks v. McDonald*, 225 Ark. 470, 472, 283 S.W.2d 166 (1955). Oil and gas have been produced, and royalties have been paid, for many years, all in reliance upon the rule of property challenged here. O. B. Core, *Tax Forfeiture Problems in the Examination of Abstracts*, 12 Ark. L. Rev. 333, 338 (1958). That rule should not now be disturbed.

B. Appellants' Failure to Develop Constitutional Issues at the Trial Level, As Well As, Appellants' Failure to Obtain Rulings on Any Such Constitutional Issues, Precludes Review on Appeal.

Arkansas law is clear that it is Appellants' burden to present a case before the trial court that fully and completely develops all issues. *Rounsaville v. State*, 372 Ark. 252, 258-59, 273 S.W.3d 486 (2008); *Eastin v. State*, 370 Ark. 10, 16-18, 257 S.W.3d 58 (2007); *Raymond v. State*, 354 Ark. 157, 162-68, 118 S.W.3d 567 (2003). More particularly, this Court has explicitly stated that "constitutional arguments must be raised and fully developed in the trial court." *Raymond*, 354 Ark. at 162.

Moreover, it is Appellants' burden to obtain a clear ruling on any and all issues from the trial court, and questions left unresolved are waived and may not be relied upon on appeal. *Misskelley v. State*, 323 Ark. 449, 471, 915 S.W.2d 702, *cert. denied*, 519 U.S. 898.

117 S.Ct. 246, 136 L.Ed.2d 174 (1996); *Bowen v. State*, 322 Ark. 483, 502, 505, 911 S.W.2d 555 (1995), *cert. denied*, 517 U.S. 1226, 116 S.Ct. 1861, 134 L.Ed.2d 960 (1996). This Court has stated repeatedly that the failure to obtain a ruling on an issue at the trial court level, including a constitutional issue, precludes a review of the issue on appeal. *Parker v. BancorpSouth Bank*, 369 Ark. 300, 311, 253 S.W.3d 918 (2007); *Morrison v. Jennings*, 328 Ark. 278, 284, 943 S.W.2d 559 (1997).

Even assuming that constitutional issues were adequately raised by Appellants in their written pleadings at the trial level, such constitutional issues were not developed, either factually or legally, in any subsequent pleadings or at the hearing on the Summary Judgment Motion. At best, it may be said that Appellants referred to constitutional issues in their original Petition, ¶ 34, Add. 23, and in their Response in Opposition to the subject Motion for Summary Judgment, pp. 16-17, Add. 186-87. However, such constitutional issues were not developed, either factually or legally.

Critically, as the transcript reflects, none of Appellants' constitutional issues were raised at the summary judgment hearing, at which the trial court carefully considered each issue presented, one at a time. Add. 363-85. As reflected at Add. 375-76, and as noted by the mineral owner Appellees at Arg. 2 of their Brief, Appellants advised the trial court that the involved issues were limited to (1) distinguishing

prior subjoinder cases and (2) a contention for retroactive application of Act 961 of 1985.

This is hardly sufficient, under Arkansas law, to be considered full and complete development of any constitutional issue. *See Rounsaville*, 372 Ark. at 258-59; *Raymond*, 354 Ark. at 162-68.

Moreover, Appellants failed to obtain a ruling from the trial court on constitutional issues. As a result, neither the trial court's Final Judgment or Order for Summary Judgment contain any ruling on constitutional issues. Add. 5-12. Such issues are waived and may not be relied upon on appeal.

* * *